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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936

No. ~~1432~~ 901

HARVEY R. BITTER,

Petitioner,

- versus -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAY T. MCCANN,
RICHARD A. MCDERMOTT
152 W. Wisconsin Ave.
Milwaukee, Wisconsin.
Counsel for Petitioner

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit will be reported unofficially at 374 F. 2d 744 (May 22, 1967 Advance Report). The Opinion is printed and appended to this Petition pursuant to Rule 23 (1) (i) together with the Order on Rehearing.

Harvey R. Bitter, the petitioner herein, respectfully petitions for and prays that a writ of certiorari issue to review the final Judgment of the United States Court of Appeals for the Seventh Circuit, entered on the 6th

day of February, 1967, which affirmed the Judgment of the United States District Court for the Eastern District of Wisconsin. On April 20, 1967 an order was entered denying the petition for rehearing.

JURISDICTION

Petitioner believes that 28 U.S. C. § 1254 (1) confers jurisdiction on this Court to review the judgment of the Court below by writ of certiorari.

QUESTION PRESENTED

Where in mid-trial during presentation of the defense, without precedent or authority, and contrary to Rule 42 (a) of the Rules of Criminal Procedure, the trial judge summarily placed defendant in custody, and defendant at the day's adjournment was removed to and incarcerated in a jail about forty miles from the place of trial, unknown to his attorney, and defendant was kept in custody throughout the balance of the trial, was defendant deprived of his Right to Counsel and denied Due Process in violation of Articles V and VI of the Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTE AND RULE INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION:

ARTICLE V

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

ARTICLE VI

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

18 U.S.C. § 401

(Title 18, U.S.C.A., Crimes and Criminal Procedure, § 401, p. 501)

"§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.".

18 U.S. C. Rules of Criminal Procedure

(Title 18, U.S.C.A., Rule 42, p. 29)

"Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The

notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or crititism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

STATEMENT OF THE CASE

The trial of the petitioner in the United States District Court for the Eastern District of Wisconsin upon an indictment charging in eighteen counts violations of Section 1341, Title 18, U.S.C. (Mail Fraud) and in a nineteenth count a violation of Section 1342, Title 18, U.S.C. (use of an assumed name) commenced before the trial court on waiver of a jury trial on Monday, August 23, 1965. It was indicated by the United States Attorney that most if not all of Wednesday would be consumed by the government's case; but early on Wednesday afternoon, August 25, 1965, midway through the trial, the government rested unexpectedly. Petitioner's counsel had been prepared to proceed at some length; but because of the statements by the government's attorneys petitioner's counsel had not completed preparation for a full half day's testimony with supporting documentary evidence.

At recess time, about 3:00 P.M., a request was made of the trial court by petitioner's counsel that petitioner be permitted to go to his office to obtain additional documentary evidence. Permission was granted to petitioner's counsel without the presence of petitioner; and the trial judge set 3:45 P.M. as the time for re-convening. No order or direction was given by the Court to petitioner directly; and the permission was communicated to petitioner by his counsel. Nothing further was said.

Petitioner, who had attended every session of the court promptly, was delayed in returning some thirty-seven minutes. Upon his return, without permitting any explanation, the trial judge ordered petitioner into custody to be so kept throughout the balance of the trial. (App. 349).

Petitioner and his counsel had been advised that petitioner would be confined at the Waukesha County jail, some eighteen miles from the Federal Building in Milwaukee where the court was located. Instead the Marshal took petitioner to the Kenosha County jail some forty miles distant (App. 451). The Marshal made no attempt to contact petitioner's counsel from the time petitioner was taken from the court room on Wednesday afternoon until the trial was about to reconvene (App. 361,453).

An effort was made at the close of court on Wednesday to have petitioner released (App. 359), but the trial judge was adamant; and the petitioner remained in custody for the remainder of the trial. This incarceration effectively terminated any opportunity for effective and continuing consultation and preparation throughout the balance of the trial. There had been no testimony introduced by the Government in respect to five of the counts of the Indictment until Wednesday morning; and there were extensive records, particularly those relating to advertising of the

businesses referred to in all of the counts upon which petitioner was found guilty, which required his personal presence at his office and the office of his attorney. Petitioner had no way of knowing in advance of the trial what specific claims would be asserted by the complainants. In particular, it could not be assumed that there would be denials of matters such as notification of prospects, communication of inquiries, and repeated advertisements. Consultation at the conclusion of each day's testimony, overnight preparation, and early morning consultation prior to the resumption of the trial were compelled by the nature of the charges and the multiplicity of details associated with petitioner's business as it related to each count.

The motion of petitioner's counsel for a mistrial made at the opening of court on Thursday, August 26, 1967 was denied summarily (App. 360). A motion for a new trial was made at the conclusion of the trial upon the ground that petitioner was deprived of the right to counsel and an opportunity to continue to prepare his defense throughout the course of the trial (App. 483). That motion was denied. This was followed by a written motion for new trial upon the ground, among others (App. 568):

* * *

"e. In the interest of justice by reason, among others, of defendant having been deprived of the opportunity to properly and adequately present testimony and evidence, to adequately prepare his defense, and to freely consult with and obtain the advice of his attorney and to continue the preparation of his defense in the light of such conferences and consultation as the result of which defendant was prejudiced critically and substantially and deprived of a fair trial."

The affidavit of petitioner accompanied the written motion (App. 568-577). The written motion was denied (App. 581).

The judgment of the trial court was appealed to the court below; and the Court of Appeals handed down its Opinion (copy appended) on February 6, 1967 affirming the judgment of the District Court, to which Opinion and judgment Judge Elmer J. Schnackenberg, one of the three judge division before whom the case was heard, dissented. A petition for rehearing in the court below was denied under date of April 20, 1967 (copy of decision appended). Judge Elmer J. Schneckenberg voted to grant the petition for rehearing.

On April 24, 1967 the Clerk of the United States Court of Appeals for the Seventh Circuit was requested by letter to prepare the Supreme Court Record in preparation for the filing of a petition for writ of certiorari. A motion for stay of the mandate was prepared and filed; and a stay of thirty days to June 1, 1967 was granted under date of May 2, 1967 (copy of order appended).

The written request for the Supreme Court Record was mislaid in the office of the Clerk; and the Record was not certified until May 19, 1967. The Record was received by petitioner's counsel by ordinary mail delivery at Milwaukee, Wisconsin on May 22, 1967, accompanied by three additional copies of the printed appendix. Six additional copies of the printed appendix were received by similar delivery on May 23, 1967.

REASONS FOR GRANTING THE WRIT

I

RIGHT TO COUNSEL

The right "to have the Assistance of Counsel" in the defense of a criminal prosecution is one of the "great rights" preserved and protected by the unassailable command of Article VI of the Bill of Rights. Petitioner rests his prayer for review first (under Rule 19 (b)) upon the belief that the court of appeals in its divided determination herein sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision by this Court.

The right to assistance of counsel implies the right to consult, confer, and communicate with counsel freely and fully. To have deprived petitioner of this right suddenly and without warning midway through the trial was a clear and patent denial of his Constitutional right. It is significant that thorough research has failed to disclose a similar instance of the severing of communication between a defendant and his counsel by incarceration during the progress of the trial. Close in principle and persuasive of petitioner's position is *United States v. Venuto*, 182 F. 2d 519 (C.A. 3d Cir. 1950) in which during the trial of the action the defendant was instructed not to discuss the case during an overnight recess. He and his counsel were required to bind themselves not to consult together under threat that otherwise the court would revoke defendant's bail and commit him to jail incommunicado to insure that there would be no such consultation. At 182 F. 2d 521-522 the court stated:

> "(2) We recognize the necessity for reposing in a trial judge a reasonable discretion in the matter of

restricting persons in the court room so that proceedings may be conducted in an orderly manner; but, as announced in *Glasser v. United States*, 315 U. S. 60, 71, 62 S. Ct. 457, 465, 86 L. Ed. 680: 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.'".

(3) To deprive an accused defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing a restriction of silence between accused and counsel during a trial recess. We reject the Government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client but as stated in Glasser v. United States, supra, 315 U. S. at page 76, 62 S. Ct. at page 467: 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. By restricting the right of consultation between this defendant and his counsel during court recesses, defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the Constitution. His objection on this ground and his motion for mistrial directed to the trial court were well founded. Accordingly, the conviction must be reversed and a new trial granted.'"

The summary incarceration of petitioner resulted in more than a mere hinderance to the defense of the action. Petitioner and counsel were advised that he would be confined at Waukesha, Wisconsin some eighteen miles from the place of trial and from the offices of petitioner and counsel. Such confinement would have worked a

hardship and would have deprived petitioner of assistance of counsel; but that was not done. Instead, the Marshal took petitioner to the Kenosha County jail, about forty miles from Milwaukee, without advising petitioner's counsel. This precluded all opportunity to examine, analyse, and discuss the testimony of the government's witnesses and to counter such testimony with documentary evidence.

It is significant that the sudden incarceration of petitioner did not occur until the third day of the trial and only after the government had rested and defendant's proof was being introduced. The suddenness of the confinement not only impeded the defense, but disrupted the plan and order of the defense which contemplated petitioner's freedom of activity. Had petitioner been confined from the outset other arrangements would have been made. Any interference with the established routine was bound to affect the conduct of the defense.

In *Glasser v. United States* (1942) 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 at page 67 it is stated:

> "Admittedly the case against Glasser is not a strong one. The Government frankly concedes that the case with respect to Glasser 'depends in large part * * * upon a development and collocation of circumstances tending to sustain the inferences necessary to support the verdict'. This is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Had petitioner been in custody at the commencement of the trial appropriate provisions would have been made to insure the conduct of the defense. So too, had there been a slightest apprehension of confinement from mid-trial on, similar provisions could have been made. It was the suddenness of the unexpected confinement in addition to the change of place of confinement which embarrassed and interfered with the defense of petitioner. Time, distance and curtailment of communication so prejudiced the defense of appellant as to infect the subsequent course of the trial with an absence of the fundamental fairness essential to the very concept of justice. (To paraphrase the verbiage in the decisions of the Supreme Court of the United States in *Crooker v. State of California* (1958) 357 U. S. 433, 439, 78 S. Ct. 1287, 2L. Ed. 2d 1448 and *Lisenba v. People* (1941) 314 U. S. 219, 236, 62 S. Ct. 280, 86 L.Ed. 166.)

The trial court stressed its dependence upon circumstantial evidence (App. 482) in arriving at its finding that petitioner was guilty. It is obvious that any impairment of petitioner's freedom to produce such testimony and evidence necessarily prejudiced his defense. As the accused "requires the guiding hand of counsel at every step in the proceedings against him" *(Powell v. Alabama)* (1932) 287 U. S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158), so, too, does counsel depend upon the availability of the accused for consultation throughout the trial. The severance of the established intercourse between counsel and the petitioner at such a critical stage necessarily tended to prejudice the cause of the petitioner.

Under the circumstances present herein the court below was required to speculate with respect the effect of the departure from the accepted and usual course of judicial proceedings and of petitioner's confinement upon the out-

come of the trial. In *Glasser v. United States* (1942) 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 the Court stated (p. 76):

"* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial * * *."

II

DUE PROCESS

Although the denial of assistance of counsel is inextricably bound with a denial of petitioner's right under Article V of the Bill of Rights to due process of law, petitioner presents as a second reason for granting a writ of certiorari a clear denial of due process. The power and authority to punish for contempt is to be found in Section 401, Title 18 U.S.C.A. That section provides:

"§401. Power of court

A court of the United States shall have power to punish by fine or imprisonment at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

* * * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

The tardy return of petitioner with documentary evidence obtained from his office could hardly be called misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice; nor could his conduct be properly denominated disobedience or resist-

ance to any lawful writ, process, order, rule, decree or command of the court. It is significant that no explanation was entertained by the Court (App. 348, 349).

The method employed the trial judge in summarily punishing the defendant for the delay of the proceedings was contrary to and in violation to the Rules of Criminal Procedure. The pertinent provision is as follows:

"Rule 42. Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

In *Sacher v. United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952), the court said (pp. 454-455):

* * * * *

"Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes. But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders."

* * * * *

In *Widger v. United States* (C. A. La. 1957) 244 F 2d 103, the Court stated (pp. 106-107):

* * * * *

"Moreover, we do not think the proceedings in the Court below were conducted in obedience to the requirements of Rule 42 (a). By its terms, a criminal contempt may 'be punished summarily' only 'if the judge certifies' that he witnessed the alleged contemptuous conduct and that it was committed in his actual presence. The rule further provides that the

order must 'recite the facts.' This record contains no certificate at all by the judge and the order does not recite any fact but merely the conclusions of the Court.

This rule providing for punishment of contempts summarily must be given a 'narrow construction' providing, as it does, for punishment without affording the accused 'the normal safeguards surrounding criminal prosecutions'; it being plain from the history of contempt procedures that the courts and congress have demonstrated a definite 'plan to limit the contempt power to " 'the least possible power adequate to the end proposed' ".' It is, therefore, essential that courts proceeding summarily 'must be meticulously careful to observe * * * procedural * * * safeguards.' While it appears from the record as a whole that the contemptuous conduct was in the presence of the Court, no certificate was signed by the Judge as required by the rule, and the remaining portions of the record can be considered only as assisting the Court in construing the terms of the certificate."

* * * * *

It is respectfully submitted that the trial judge not only acted without any certificate of contempt required by Rule 42 (a) of the Rules of Criminal Procedure, but acted without sufficient cause or provocation and in clear violation of the Constitutional right of petitioner. This error so affects the trial below that the judgment of conviction is rendered fatally suspect.

In *In Re Murchison* (1955) 349 U. S. 133, 75 S. Ct. 623, 99 L. ed 942 this Court stated (p. 136):

"(3-6) A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can

be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U. S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U. S. 11, 14, 75 S. Ct. 11, 13."

In *In Re Oliver* (1948) 333 U. S. 257, 68 S. Ct. 499, 92 L. ed 682 this Court stated (pp. 274-275):

"That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in Cooke v. United States, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the Terry rule as reaching only such conduct as 'created an open threat to the orderly pro-

cedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.' Id., at page 536 of 267 U. S., at pages 394, 395 of 45 S. Ct."

It is respectfully submitted that petitioner was entitled to explain the reason for his delayed return to the court room; and if the explanation were insufficient cause for excuse, punishment could have been delayed until the conclusion of the trial. Due process required that petitioner have a fair trial before a fair tribunal; and to be deprived of Assistance of Counsel as a penalty for tardiness is to have deprived him of his liberty without due process of law.

CONCLUSION

The petitioner prays that this Court will grant a review herein upon the showing made with respect to his having been deprived of Assistance of Counsel and having been deprived of his liberty without due process of law. Tardy as petitioner was there was nothing in his conduct which evidenced any intention to obstruct the administration of justice. He was confined without sufficient cause or provocation and without being heard, and he was punished by denial of his Constitutional rights.

Respectfully submitted,

RAY T. McCANN,
RICHARD A. McDERMOTT
152 W. Wisconsin Avenue
Milwaukee, Wisconsin.
Counsel for Petitioner

APPENDIX

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1966 — JANUARY SESSION, 1967

No. 15494

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HARVEY R. BITTER,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

February 6, 1967

Before SCHNACKENBERG, KNOCH and FAIRCHILD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Defendant Harvey R. Bitter was convicted, after trial before the court without a jury, on seven counts charging use of the mails to execute a scheme to defraud.[1] He has appealed, claiming (1) that the evidence was insufficient to establish guilt beyond a reasonable doubt, (2) that the court erroneously refused to consider certain evidence, (3) that the court erroneously denied an inspection of grand jury minutes, and (4) appellant was deprived of assistance of counsel.

[1] 18 U.S.C.A. § 1341.

Bitter is a real estate broker and business opportunity broker. He carries on substantial business activity at Milwaukee. The indictment contained 18 counts, each relating to a transaction between Bitter and the owner or owners of a different business. Each count charged him with mailing a letter to the owner for the purpose of executing a scheme to defraud, which was alleged in the same terms in all counts. In essence, the pattern of the scheme was described as follows: Bitter would write to the owners of a business, after obtaining the names from newspaper advertisements, would solicit the owners to employ him to advertise the business and obtain a buyer. He would induce the sellers to make an advance payment of selling fee, but would not perform the services promised, and would not advertise the business as represented, and would refuse to make refunds. He would falsely represent that the business would be advertised in various newspapers whereas he knew that few if any advertisements would be run; that the business was sure to be sold as a result of his services; that the business would sell for a much higher figure than the seller's proposed price; that if the business was not sold within a certain time, the money would be refunded; that he already had a buyer; that he and his salesmen would take an active part in making the sale.

One count was dismissed on motion of the government because the owner was unable to appear. Ten counts were dismissed because the court deemed they had not been proved beyond a reasonable doubt.

The seven counts on which the court found defendant guilty may be summarized as follows:

Count 8. Mr. and Mrs. Ebelt had a sheet metal and plumbing business at Cascade, Wisconsin. After adver-

tising their business for sale, they received letters from Bitter, one of which represented he had an interested buyer. They came to see Bitter in Milwaukee and signed an agency agreement. They wanted $25,000, but Bitter said it should be $30,000. They paid him $250 as requested. Bitter said very positively the business would be sold and they would get their money back at that time. Bitter telephoned once and made an appointment to show the business, but no one came. They never saw Bitter again, nor any salesmen nor prospects.

Count 10. Carrol Fraundorf had a furnace-cleaning business at Hartford, Wisconsin. Bitter told him he would have to pay $150 to start with, and Bitter's salesmen would work on the sale. Fraundorf paid, and signed an agency agreement, but no salesmen nor prospects ever came.

Count 12. Leo Gremminger was a butcher at Campbellsport, Wisconsin. After advertising his business, he received letters from Bitter, saying that Bitter knew of his business and could make an immediate sale of it. He came to see Bitter, who said Bitter had buyers. He signed an agency agreement and paid $300. He never saw Mr. Bitter again, nor any salesmen from Bitter's office, nor any prospects.

Count 15. Ervin Leichtle had a bowling alley and soda fountain at Rio, Wisconsin. After advertising his business, he received a letter from Bitter telling him to come in. Bitter told him he had people who were looking for a business like that. Leichtle signed an agreement and paid a fee of $300. Bitter made an appointment to show the business, but no one appeared. No one ever came from Bitter's office. Bitter explained that the $300 was to pay for Bitter's trouble if Leichtle should refuse to sell to a buyer produced by Bitter.

Count 16. Mr. and Mrs. Schaefer had a small shoe store at Columbus, Wisconsin. Shortly after they advertised their business, they received letters from Mr. Bitter, the second indicating Bitter had a buyer who was very much interested in their type of business. They came to see Bitter and signed an agency agreement. They paid $250. Bitter said this was to cover considerable advertising. They never again saw Mr. Bitter, nor any of his salesmen, nor any prospects.

Count 17. Mrs. Fae Weber had an upholstery and drapery shop at Pewaukee, Wisconsin. After advertising her business for sale she received a letter from Bitter, and came for an interview. Bitter assured her he could sell it and would use the $150 deposit he demanded to take care of costs of advertising. She signed and paid. She never again saw Mr. Bitter nor any salesmen, any prospects, nor any advertisements. She wanted $12,000. He added $5,000 for his commission, so that the selling price agreed on was to be $17,000.

Count 18. Harvey Wellnitz had a store at Gillett, Wisconsin. After advertising it for sale, he had letters from Bitter, as a result of which he came to see Bitter at Milwaukee. Bitter said he had cash buyers, one right then in mind. Wellnitz signed an agreement and paid $250. He never saw Mr. Bitter again, nor any salesmen, nor any prospects. He did receive letters, apparently in response to his inquiries, in which Bitter mentioned people who were interested.

Sufficiency of Evidence

There was other testimony from which it could reasonably be inferred that Bitter did not use the agency agreement—advance payment pattern with all his clientele, but

reserved it for those he considered gullible, "wearing fins," as he expressed it to one of his salesmen, and that he routinely, in letters to owners of this type of business, falsely represented that he had considerable familiarity with their respective businesses, in order to lure them into his office. It appears that he neither did nor intended to make expenditures for advertising these particular businesses, nor to provide other services, at all commensurate with the payments received.

Although the agency agreements provided clearly enough that the payments would not be refunded, the fraud lies in the representations by which such payments were induced.

In our opinion the record contains evidence from which the court could find, beyond a reasonable doubt, that Bitter, following a pattern or scheme, consisting of false assurances and innuendoes, conveyed in part by mail, lured people in and induced them to believe he would perform services he did not intend to perform, and to pay him money in reliance upon such misrepresentations.

In arguing that the evidence is insufficient, defendant points out that he has built a substantial sales agency over a period of 25 years, dealing in business opportunities and real estate, that the procedures involved in the counts dismissed by the court were generally similar to those in the counts where a finding of guilt was made, and that Bitter caused the businesses of the complaining witnesses to be made available to salesmen in Bitter's office on the same basis as other listings. None of these facts, in our opinion, prevent, as a matter of law, a finding of guilt on the particular counts where such finding was made.

Defendant also proved that during the period covered by the indictment he had spent, in connection with his

entire business, almost $22,000 for advertising and more than $8,000 for telephone service. Defendant appears to have carried on a very substantial business as real estate and business opportunity broker. Much of it did not involve the pattern of conduct under scrutiny here. No attempt was made to prove the amount of money he spent to advertise the businesses involved in this case, nor those where the pattern of conduct was similar. It seems to us that the figures significant in the defense of this case would be the ones just referred to. It does appear that he placed a few tiny ads mentioning the businesses involved in this case, but their cost was surely nominal when compared to the advance payments exacted.

Limitation on Evidence Offered by Defense

Defendant points out that in prosecutions under this statute, transactions by a defendant not involving fraud but otherwise similar to those on which the government bases its claim of a scheme to defraud have been deemed relevant on the question of whether there was a scheme involving an intent to defraud.[3] He claims that certain rulings and directions of the court improperly limited his proof.

The record suggests that defendant intended to prove that he had been in business many years, and had concluded many deals to the satisfaction of his patrons. It was this very general line of proof which the district court declined to hear. There was no offer to prove that there were transactions involving the exaction of advance payments, as here, in which defendant incurred expense commensurate with the advance payments, or in which

[3] *Washington v. United States* (7th Cir. 1953), 64 F. 2d 936, 940; *United States v. Shevin* (7th Cir. 1961), 287 F. 2d 647, 653; 90 A. L. R. 2d 888, 901-02.

the ultimate outcome was favorable to the customer. Proof of otherwise similar transactions which did not involve fraud might tend to show that the losses suffered in the instant cases were accidental or incidental rather than the product of a designed scheme, but defendant is not in a position to claim that the court excluded such proof.

Denial of Inspection of Grand Jury Minutes

Defendant was first indicted July 10, 1964. There were motions, and apparently the government conceded the indictment was defective. On September 1, the United States Attorney wrote the court stating that a new indictment would be presented to the grand jury, and predicting it would be substantially the same as the first. The new indictment was returned September 2 by a different grand jury. Defendant moved to dismiss the indictment, and for inspection of the minutes.

He has shown the probability that the grand jury did not hear testimony from the owners of the businesses involved in the 18 counts. The grand jury may, however, have considered reports, statements, or other information which would not be competent upon the trial. An indictment cannot be challenged, however, upon the ground that all the evidence before the grand jury was hearsay.[3]

The mere possibility that the indictment was not the work of the grand jury, as it purported to be, or that the grand jury had no information upon which to base it is insufficient to show an abuse of discretion in denying the opportunity to inspect the minutes. The defense has the burden of showing a particularized need for inspection.[4]

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[3] *Costello v. United States* (1956), 350 U. S. 359, 363, 76 Sup. Ct. 406, 100 L. Ed. 397.

[4] *Pittsburgh Plate Glass Co. v. United States* (1959), 360 U. S. 395, 400, 79 Sup. Ct. 1237, 3 L. Ed. 2d 1323.

Confinement of Defendant During Part of Trial

The trial began Monday, August 23, 1965. The government rested its case early in the afternoon session on Wednesday, August 25. Defendant began to testify in his own behalf. After a short period a recess was taken for about 45 minutes to permit defendant to obtain records from his office. Court was to resume at 3:45 p.m., but defendant returned at 4:20 p.m. The court then said: "The defendant's arrival 37 minutes late has interrupted and disrupted the trial of this case and the court's work. I direct that the United States Marshal, when court recesses for the evening, take the defendant in custody and keep him in custody throughout the trial of this case." Attempts by counsel to offer explanation were rebuffed, and Bitter was held in custody, including the overnight recesses on Wednesday and Thursday. The trial concluded Friday.

Defendant claims that his "incarceration effectively terminated any opportunity for effective counsel and preparation throughout the balance of the trial." He emphasizes that because of overcrowding at the jail at Waukesha, 20 miles from the place of trial, where persons in federal custody are ordinarily confined, defendant was lodged at Kenosha, some 40 miles away.

If the court's action be viewed as punishment for criminal contempt, we conclude that summary procedure was appropriate under the present circumstances.[8] The facts of the matter are clearly reflected by the record, although Rule 42, requiring a certificate and order of contempt, was not complied with.

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[8] See Rule 42 (a), Rules of Criminal Procedure, authorizing summary disposition where the judge saw the conduct, committed in the actual presence of the court. Here, of course, the gist of the offense was absence from court when required to be present.

It occurs to us, moreover, that holding a defendant in custody during trial to insure his presence is more remedial than punitive, and may be justified on that ground if reasonably necessary to administer justice. It is evident that the court felt it was being imposed upon when defendant delayed proceedings in order to obtain documents which he should have known from the time of indictment, a year before, he would need for his defense.

Be these things as they may, however, and even assuming that the court's action was more severe than reasonably required by the circumstances, we find no reason to believe that defendant's defense was embarrassed or prejudiced in any way.

The record shows that no attempt at consultation during the night recesses was made by defendant or his counsel. Defendant was allowed to and did make telephone calls. He did not attempt to reach his attorney, and the attorney made no attempt to reach him. On Thursday morning, defendant was at the place of trial 35 minutes before court opened, but his counsel did not attempt to see him then. After court began, there was a short recess to permit consultation between defendant and counsel.

Defendant did produce, in support of his motion for arrest of judgment, several examples of advertisements mentioning the businesses involved, and claimed he could have produced these if he had been free to go to his office. The indictment alleged that he knew that few if any ads would be inserted, and his counsel had stated on opening argument that the proof would show he had done expensive advertising. It is incredible that his inability to look up these advertisements on Wednesday or Thursday night seriously prejudiced the defense he intended to make.

It does seem to us that the action of the district court was unnecessarily stringent, unless prompted to some extent by observations by the court of conduct or attitude not reflected by the record. We cannot conscientiously say, however, that it rendered the trial unfair under the circumstances.

The judgment appealed from is

AFFIRMED.

No. 15494

SCHNACKENBERG, *Circuit Judge,* dissenting.

Harvey R. Bitter, defendant, has appealed from a judgment of the district court convicting him, upon a trial without a jury, of using the United States mails for the purpose of executing a scheme and artifice to defraud and for obtaining money by false and fraudulent pretenses, in violation of Title 18 U.S.C. § 1341, as charged in counts 8, 10, 12, 15, 16, 17 and 18 of an indictment. By said judgment defendant was ordered imprisoned for a period of one year and a day and fined $500, on each count, said sentences to be served concurrently.[1]

On the trial before the court the government rested its case early in the afternoon of August 25, 1965.

Defendant was called as the first witness in his own behalf. He was examined by his own counsel on direct

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[1] On motion of the government, count 14 was dismissed. On defendant's motion he was acquitted as to counts 3, 4, 5, 7, 9, 11 and 13. Defendant was found not guilty as to counts 1, 2, 6 and 19.

Prior to the return of the aforesaid indictment defendant had been named in a previous indictment which was dismissed after defendant had filed pre trial motions thereto.

examination and then briefly cross-examined by government counsel. During further direct examination of defendant numerous documents were identified by him and a recess of court was taken until 3:45 o'clock to permit government counsel to inspect them and for the clerk to mark them. At the latter time defense counsel advised the court that, although he had instructed defendant to be in court at 3:45 o'clock, he had not arrived. After the court had waited 18 minutes for the appearance of defendant, he said to defense counsel "You may contact his office." Having left the courtroom for that purpose, defense counsel then returned and advised the court that defendant was "on his way back for more than 20 minutes * * * so we should be expecting him momentarily." Defendant returned to the courtroom at 4:20 o'clock. Thereupon the court stated

> "* * * defendant's arrival 37 minutes late has interrupted and disrupted the trial of this case and the court's work..
>
> "I direct that the United States Marshal, when court recesses for the evening, take the defendant in custody *and keep him in custody throughout the trial of this case.*" (Emphasis supplied.)

It is contended by defendant's counsel that the fact that during the remainder of the trial[2] defendant was kept in custody effectively deprived his counsel of an opportunity to properly represent him during the remainder of the trial. This contention becomes more significant in view of the fact that, on oral argument in this court, government counsel admitted that during his confinement, as directed by the district judge, defendant was

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[2] The order for confinement was entered on August 25, 1965 and the trial ended on August 27.

held in a Wisconsin jail at Kenosha, located about 40 miles from the federal courtroom in Milwaukee. Defendant's motion for a mistrial because of the entry of the aforesaid order was denied.

It is apparent to us that the action of the district court resulted in actually making difficult any contact between defendant and his counsel when the trial was not actually proceeding in the courtroom. This restriction necessarily substantially interfered with the opportunity traditionally enjoyed by counsel to discuss with his client the testimony offered by the government and the available use of proper evidence to be offered by way of defense. We agree with counsel for defendant that the suddenness of the order of confinement was an added impediment to an adequate defense. Unfortunately the punishment inflicted for what the court deemed defendant's improper delay in reaching the courtroom resulted in not only the summary imprisonment of defendant but deprived his counsel of the usual opportunity for consulting with his client at or near the place where the trial was being conducted. The order of the court seriously invaded the constitutionally erected safeguards for the protection of the right of a defendant to consult with, and be assisted by his counsel.[3]

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[3] In addition, it may be pointed out that there was no compliance with rule 42 (a) of the Federal Rules of Criminal Procedure, which provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Accordingly I would reverse the judgment below and remand this cause for a new trial.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

THURSDAY, APRIL 20, 1967

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. WIN G. KNOCH, *Circuit Judge*

HON. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
No. 15494
HARVEY R. BITTER,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

(Judge Schnackenberg voted to grant petition for rehearing).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

TUESDAY, MAY 2, 1967

Before

HON. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 15494

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
HARVEY R. BITTER,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

On consideration of the motion and petition of counsel for defendant-appellant,

IT IS ORDERED that the issuance of the mandate of this Court be stayed for a period of thirty (30) days from this date in accordance with the provisions of Rule 28 of the Rules of this Court.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 201

HARVEY R. BITTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on February 6, 1967. A petition for rehearing was denied on April 20, 1967. The petition for a writ of certiorari was filed on May 27, 1967, and is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the question presented, relating to the trial court's order that petitioner be remanded to custody during trial, does not warrant further review.

Petitioner was convicted in the United States District Court for the Eastern District of Wisconsin, after trial before the court without a jury, on seven counts charging the use of the mails to execute a scheme to defraud (18 U.S.C. 1341.)[1] He was sentenced to concurrent terms of imprisonment for a year and a day on each count, together with a fine of $500 on each count (a total fine of $3,500). The court of appeals affirmed, one judge dissenting (374 F. 2d 744).

1. The evidence showed that, during the period at issue, petitioner was engaged in business in Milwaukee as a real estate and business broker. He would write to persons advertising in the local newspapers that they had businesses for sale advising them that he knew the place of business and had a buyer for it (App. 316-317, 137, 179, 281, 290-291, 297, 305, 311, 327). When the owner of the business called at petitioner's office, petitioner would give further assurances of his ability to make an immediate sale. The owner would be required to make a deposit of a sum ranging from $150 to $300 to cover anticipated expenses, with the promise that the money would be returned if the business were not sold (App. 181-182, 227, 282, 292, 297, 299, 305-306, 312, 327).

Neither petitioner, his salesmen, nor any serious prospects would actually visit the place of business (App. 182-183, 228, 293, 298-299, 316, 327). Appointments to bring in alleged prospects were unful-

[1] The court acquitted petitioner on seven other counts (App. 333). "App." refers to petitioner's appendix in the court below, copies of which are on file with the Clerk of this Court.

filled (App. 182-183, 327). Requests for return of the deposit at the termination of the contract were uniformly rejected (App. 284, 293, 306, 329). In one instance, the owner was even required to pay a fee for cancellation of the contract at the time of its expiration (App. 228).

Former salesmen for petitioner, who paid from $1,500 to $1,750 for the privilege of joining the organization, testified that during the periods of their respective employment no known sales of businesses occurred (App. 137, 147-148, 243, 258, 260). The secretary who worked for petitioner for four years knew of only one sale (App. 319).

After the close of the government's case, during petitioner's direct examination, petitioner's attorney offered in evidence an envelope (Defendant's Exhibit 171) relating to a negotiated sale (App. 347). When petitioner was asked whether he had similar envelopes and indicated that he had, the court declared a recess so that the documents could be marked and inspected by government counsel (App. 348).

At the resumption of proceedings, the clerk said he had marked the documents through the year 1963. Although it was then 4:03 p.m.—18 minutes after trial had been scheduled to resume—petitioner was not in the courtroom. He arrived at 4:20 p.m. The court, noting that petitioner had disrupted the trial and the court's work, directed the marshal to keep petitioner in custody during the remainder of the trial. Petitioner's counsel said he felt responsible for the delay, but the court ordered the defense to proceed, saying

there would be no more delays so far as the defendant was concerned (App. 349-350).

On the following morning at 9:15, petitioner's counsel moved for a mistrial on the ground that petitioner had been incarcerated in the Waukesha County jail. Petitioner corrected this statement, saying that he was held at the Kenosha jail. The motion was denied. Counsel then told the court that he had not had the opportunity to confer with petitioner concerning the testimony of government witnesses given the previous day, or to examine papers which petitioner had brought to court. The Assistant United States Attorney stated that the deputy marshal had brought petitioner to the court house, and that he had been available for conference, since 8:40 a.m. Petitioner's counsel replied that petitioner had on several occasions spoken to the deputy marshal about conferring with his counsel and had received the answer that he would be produced in court. He said that counsel had not been afforded the opportunity to confer with his client. Upon the court's inquiry, the deputy marshal stated that counsel had given no indication that he wished to see petitioner, that the deputy had advised petitioner that as soon as his counsel was available he could speak to him, and that counsel was walking into the courtroom when they approached. (App. 360-361). The court permitted a brief recess for a conference. The deputy marshal subsequently testified that, at the close of court on the previous afternoon, petitioner had been permitted to make telephone calls at the marshal's office, again at a gasoline service sta-

tion and again when they arrived at the jail. Petitioner did not call his attorney, and the attorney had not tried to communicate with petitioner (App. 450-454).

In an affidavit annexed to his motion for a new trial, petitioner stated that on Wednesday, when the court recessed at 3 p.m., he had gone to his office to obtain records material to his defense in the light of testimony given by government witnesses on that day; and that he had been delayed in traffic and prevented from returning until approximately 4:22 p.m., some 37 minutes later than the time set by the court. He stated that his confinement prevented him from getting records in his office of which he alone had knowledge and that these would show, contrary to the evidence offered by the government, that he had offered the properties by way of advertising (App. 568-577). In overruling the motion the court pointed out that the indictment had clearly indicated what the government was going to prove (App. 581).

2. The trial court's action in remanding petitioner to custody during trial was not based upon its power to punish contempt, but upon its inherent power to take appropriate steps to insure petitioner's presence and the orderly progress of the trial. *Fernandez* v. *United States*, 81 S. Ct. 642, 5 L. Ed. 2d 683 (per Harlan, Circuit Justice); *United States* v. *Bentvena*, 288 F. 2d 442, 445 (C.A. 2); *United States* v. *DiPietro*, 302 F. 2d 612 (C.A. 2); *United States* v. *Rice*, 192 Fed. 720 (C.C. S.D.N.Y). Even if, as the court of appeals suggested, the action taken may have

been unnecessarily stringent, it did not constitute deprivation of the right to counsel. Consultation between attorney and client was possible both at the close of the afternoon session and the following morning before the court convened, but no efforts to that end were made by either petitioner or his counsel. The circumstance that petitioner was taken to a jail more distant than the one originally contemplated lacks significance, as neither he nor his lawyer tried to reach the other. The claim that petitioner was prevented by his incarceration from gathering documentary evidence to show that he had advertised the businesses listed with him is without substance ("incredible," the majority below thought; see Pet. App. 27), in view of the specific allegation relating to that matter in the indictment (App. 4, sub-paragraph (aa)).[2]

[2] There is no substance to the claim that petitioner was surprised by the government's closing its case earlier than expected. Petitioner states that the United States Attorney had previously indicated that "most if not all of Wednesday would be consumed by the government's case," the government rested early Wednesday afternoon (Pet. 4).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JUNE 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BITTER *v.* UNITED STATES.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 201. Decided October 16, 1967.

PER CURIAM.

Petitioner was tried on 18 counts of violating the mail fraud statute, 18 U. S. C. § 1341, and one count of using an assumed name, a violation of 18 U. S. C. § 1342. On the third day of trial, the Government rested its case. This was earlier than it had announced or than petitioner had anticipated. At recess time petitioner sought leave of the court to go to his office in order to gather additional evidence for the defense. Permission for this was granted. Forty-five minutes were alloted for the recess. Petitioner, who had previously appeared promptly at every session of the trial, was this time tardy by 37 minutes in returning to court. Without warning, hearing, or explanation, the trial judge ordered petitioner into custody for the balance of the trial. Attempts by petitioner's counsel to offer explanations for petitioner's lateness were to no avail.

Defense counsel was then advised that petitioner would be kept in custody in a county jail located some 18 miles from the court. In fact, petitioner was taken about 40 miles distant, to a different jail. Counsel's endeavors throughout the trial to obtain petitioner's release proved fruitless. Petitioner remained in custody for the duration of the trial. He was convicted on seven counts of mail fraud and given concurrent sentences of one year and one day on each count. He was also fined a total of $3,500.

Petitioner contended that his incarceration was unjustified and that it materially interfered with his right to counsel and severely impeded his defense. The Court

of Appeals for the Seventh Circuit affirmed the conviction. 374 F. 2d 744 (1967). We grant certiorari and reverse.

A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial. See *Fernandez* v. *United States*, 81 S. Ct. 642 (1961) (memorandum of MR. JUSTICE HARLAN in chambers); *Carbo* v. *United States*, 288 F. 2d 282 (C. A. 9th Cir. 1961); *Christoffel* v. *United States*, 196 F. 2d 560 (C. A. D. C. Cir. 1951).*

The record in this case shows only a single, brief incident of tardiness, resulting in commitment of the defendant to custody for the balance of the trial in a jail 40 miles distant from the courtroom. In these circumstances, the trial judge's order of commitment, made without hearing or statement of reasons, had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial. Punishment may not be so inflicted. Cf. Rule 42 of Fed. Rules Crim. Proc. (governing the contempt power). We therefore hold that the order was unjustified and that it constituted an unwarranted burden upon defendant and his counsel in the conduct of the case.

Accordingly, we grant certiorari and reverse the judgment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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*It does not appear whether defendant was at large on bail at the time of the order remitting him to custody. But the same principle would apply if he had been at liberty on his own recognisance. Cf. Bail Reform Act of 1966, 18 U. S. C. § 3146.